Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF REX HOSPITAL, A CORPORATION, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

RAY S. BOLZE
JOHN R. FORNACIARI
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701

Attorneys for Respondents

December 22, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
A. The Facts Alleged by Petitioner	2
1. The Parties	3
2. The Conduct Complained of	3
3. The Product and Geographic Markets in Which the Alleged Conspiracy Occurred	7
B. Proceedings in the District Court and the Court of Appeals	8
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. JURISDICTION UNDER THE SHERMAN ACT MAY BE INVOKED ONLY ON A CASE-BY-CASE BASIS, AND ONLY WHEN THE CONDUCT COMPLAINED OF OCCURS IN INTERSTATE COMMERCE OR, IF WHOLLY INTRASTATE, SUBSTANTIALLY AND ADVERSELY AFFECTS INTERSTATE COMMERCE	12
II. THE CONDUCT COMPLAINED OF OCCURRED ONLY INTRASTATE AND NOT IN THE FLOW OF INTERSTATE COMMERCE	21
A. The Alleged Conspiracy Operated Wholly Within the Raleigh Area and Upon the Provision of a Localized and Personalized Service	21
B. The Use of Out-of-State Supplies and Receipt of Insurance Payments Does Not Transform the Provision of Hospital Services in Wake County into Interstate Commerce	29

TABLE OF CONTENTS—Continued

	Page
III. THE CONDUCT COMPLAINED OF DID NOT SUBSTANTIALLY AND ADVERSELY AFFECT INTERSTATE COMMERCE	35
A. The Effect, If Any, of the Alleged Conspiracy on Interstate Commerce Resulted Indirectly from the Alleged Prevented Expansion of Mary Elizabeth Hospital	35
B. The Alleged Prevention of the Expansion of Mary Elizabeth Hospital Did Not Substantially and Adversely Affect Interstate Commerce	38
1. The Use of Out-of-State Supplies and Equipment	40
2. The Receipt of Insurance Payments from Out-of-State Insurers and Medicare and Medicaid	43
3. Communications Across State Lines	46
4. Out-of-State Financing and the Planned Expansion of Mary Elizabeth Hospital	48
5. Travel of Out-of-State Patients and Other Alleged Out-of-State Contacts	48
6. The Necessity for a Jurisdictional Line Under the Sherman Act	50
IV. THE EN BANC DECISION CORRECTLY AFFIRMED DISMISSAL OF THE ACTION ON THE AMENDED COMPLAINT ALLEGATIONS	51
CONCLUSION	53

TABLE OF AUTHORITIES

Cases:

A. Cherney Disposal Co. v. *Chicago & Suburban Refuse Disposal Ass'n.*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) 28
Burke v. *Ford*, 389 U.S. 320 (1967) 12, 29
Butte Medical Properties, 168 N.L.R.B. 266 (1967) 18
Cotillion Club, Inc. v. *Detroit Real Estate Board*, 303 F. Supp. 850 (E.D. Mich. 1964) 27, 47, 50
Doctors, Inc. v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973) 17, 25, 28
Elizabeth Hospital, Inc. v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959) 24, 41, 49, 51
Evans v. *S. S. Kresge Co.*, 394 F. Supp. 817 (W.D. Pa. 1975) 43
Evanston Cab Co. v. *City of Chicago*, 325 F. 2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964) 19, 51
Federal Trade Commission v. *Bunte Brothers*, 312 U.S. 349 (1941) 21
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 11, 29, 30, 31, 32, 43
Greenville Publishing Co., Inc. v. *Daily Reflector, Inc.*, 496 F. 2d 391 (4th Cir. 1974) 12
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974) 12, 16, 19, 35, 38, 42, 50
Helvering v. *Davis*, 301 U.S. 619 (1937) 45
Hotel Phillips, Inc. v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd per curiam*, 301 F. 2d 443 (8th Cir. 1962) 27, 49, 51
In the Matter of Certificate of Need for Aston Park Hospital, 282 N.C. 542, 193 S.E.2d 729 (S.Ct. N.C., February 1973) 4, 37
John Kalin Funeral Home, Inc. v. *Fultz*, 313 F. Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F. 2d 1342 (9th Cir.), *cert. denied*, 404 U.S. 881 (1971) 20, 30, 47

TABLE OF AUTHORITIES—Continued

	Page
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	13, 14, 15
Lawson v. *Woodmere*, 218 F.2d 148 (4th Cir. 1954)	20
Lehrman v. *Gulf Oil Corp.*, 464 F. 2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972)	28, 39, 40
Lieberthal v. *North Country Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964)	12, 27, 48, 51
Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951)	40
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	12, 17, 32
Marston v. *Ann Arbor Property Managers (Management) Ass'n.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970)	12, 27, 40, 43, 51
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	13, 14, 17, 45, 51
Nankin Hospital v. *Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973)	24, 49
N.L.R.B. v. *Fainblatt*, 306 U.S. 601 (1939)	17
N.L.R.B. v. *Inglewood Park Cemetery Ass'n.*, 355 F. 2d 448 (9th Cir. 1966)	20
N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	39, 45, 51
N.L.R.B. v. *Pierce Brothers*, 206 F.2d 569 (9th Cir. 1953)	20
Page v. *Work*, 290 F. 2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961)	26, 29, 40, 42
Perez v. *United States*, 402 U.S. 146 (1971)	13
Polish National Alliance v. *N.L.R.B.*, 322 U.S. 643 (1944)	15
Rasmussen v. *American Dairy Ass'n.*, 472 F. 2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973)	17, 38, 42
Riggall v. *Washington County Medical Society*, 249 F. 2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958)	24, 51

TABLE OF AUTHORITIES—Continued

	Page
Robinson v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956)	24, 51
Spears Free Clinic and Hospital for Poor Children v. *Cleere*, 197 F.2d 125 (10th Cir. 1952)	24
Sun Valley Disposal Co. v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969)	27, 30, 43
United States v. *American Building Maintenance Industries*, 422 U.S. 271 (1975)	26, 38
United States v. *American Society of Anesthesiologists, Inc.*, Civil No. 75-4640 (S.D.N.Y. filed Sept. 22, 1975)	46
United States v. *Bensinger Co.*, 430 F. 2d 584 (8th Cir. 1970)	12, 30
United States v. *Darby*, 312 U.S. 100 (1941)	38
United States v. *Employing Plasterers Ass'n.*, 347 U.S. 186 (1954)	39
United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945)	28, 40
United States v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Oregon 1950)	11, 16, 23, 24, 42, 44, 45, 49, 50
United States v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944)	28, 33, 34
United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947)	11, 16, 19, 26, 33, 39, 48, 49, 50, 51
Wickard v. *Filburn*, 317 U.S. 111 (1942)	15
Wolf v. *Jane Phillips Episcopal-Memorial Medical Center*, 513 F. 2d 684 (10th Cir. 1975)	51
Yellow Cab Co. of Nevada v. *Cab Employers, Automotive & Warehousemen, Local #881*, 457 F. 2d 1032 (9th Cir. 1972)	12, 27, 40, 51

Statutes:

Civil Rights Act 1964, Title II:

42 U.S.C. §§ 2000a-2000a-6 (1970)	13

TABLE OF AUTHORITIES—Continued

	Page
Clayton Act:	
Section 4, 15 U.S.C. § 15 (1970)	3
Section 26, 15 U.S.C. § 16 (1970)	3
Constitution of the United States:	
Article I, Section 8, Clause 3	2
Article I, Section 8, Clause 1	45, 50
Consumer Protection Act, Title II:	
18 U.S.C. §§ 891 *et seq.* (1970)	13
Fair Labor Standards Act:	
29 U.S.C. §§ 201 *et seq.* (1970)	13
Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* (1970)	45
General Statutes of North Carolina:	
Section 57.1 *et seq.* (Michie Replacement 1975)	44
Section 75.1 *et seq.* (Michie Replacement 1975)	50
Sections 90-289 *et seq.* 1971 Advance Legislative Service to General Statutes of North Carolina, Pamphlet No. 13, *Repealed*, Session Laws 1973, c. 113	4
National Labor Relations Act:	
29 U.S.C. § 151 *et seq.* (1970)	13, 15, 17, 18
29 U.S.C. § 152(6) (1970)	18, 20
29 U.S.C. § 152(7) (1970)	19, 20
Sherman Act:	
Section 1, 15 U.S.C. § 1 (1970)	*passim*
Section 2, 15 U.S.C. § 2 (1970)	*passim*
Social Security Act of 1935, 49 Stat. 620 (1935)	45
Social Security Act, Title XVIII (Medicare):	
42 U.S.C. § 1395 (1970)	45

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1395h (1970)	44
42 U.S.C. § 1395h(a) (1970)	44
42 U.S.C. § 1395u (1970)	44
Rules and Regulations:	
Federal Rules of Civil Procedure:	
Rule 12(b) (1)	8, 11, 51
Rule 12(b) (6)	8, 11, 51
Code of Federal Regulations:	
20 C.F.R. § 405.1803(a) (1975)	44
31 C.R.F. § 205.1 *et seq.* (1975)	45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF R[illegible]X HOSPITAL, A CORPORATION, JOSEPH BARNES, GEORGE STOCKBRIDGE, and RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

This is a private antitrust action initiated by petitioner alleging violations of Sections 1 and 2 of the Sherman Act and seeking treble damages and injunctive relief. The court below, sitting *en banc*, affirmed dismissal of petitioner's complaint, as amended, for failure to satisfy the interstate commerce jurisdictional requirements of the Sherman Act.

The sole question presented is whether the well pleaded facts alleged in petitioner's complaint, as amended, satisfy the interstate commerce jurisdictional requirements of Sections 1 and 2 of the Sherman Act.

Contrary to petitioner's arguments (Br. at 16 and 20),[1] this case does not present a question of the legislative power of Congress under the Commerce Clause, Article I, § 8, cl. 3, and affirmance of the result below will in no way limit the legislative power of Congress under the Commerce Clause. This case involves only a determination as to the sufficiency of the specific facts alleged in the complaint and amendment thereto, as measured against the well established standards for jurisdiction under Sections 1 and 2 of the Sherman Act. (*See infra* pp. 12-21.

STATEMENT OF THE CASE

A. The Facts Alleged by Petitioner

In its complaint, petitioner concludes that respondents conspired to "fix, maintain and allocate" the number of hospital beds in Raleigh, North Carolina, to "allocate customers and submarkets" among themselves and to "foreclose the market" against petitioner and "prevent" petitioner "from competing for an expanded share" of hospital services in Raleigh, North Carolina. (App. at 15.)[2] The allegations of fact in support of the conclusionary complaint assertions relate to respondents' alleged conspiracy to oppose petitioner's application to expand the facilities of Mary Elizabeth Hospital in Raleigh, the appeal by certain co-conspirators from the order granting petitioner's application for expansion, and respondents' alleged attempts to create publicity adverse to petitioner in Wake County, North Carolina. In answer to questions from the district court during oral

[1] Brief of petitioner is referred to herein as "Br."

[2] The Single Appendix is referred to herein as "App."

argument, counsel for petitioner made clear that the subject of petitioner's complaint was the "thwarting" by respondents and co-conspirators of petitioner's planned expansion of its hospital facilities in Raleigh, North Carolina. (App. at 43-44.)

1. *The Parties*

Petitioner Hospital Building Company is a North Carolina corporation "organized for profit" and operates Mary Elizabeth Hospital in Raleigh, North Carolina. (App. at 10.) Mary Elizabeth Hospital is a hospital engaged in "offering general medical-surgical hospital services to the public" for profit. (App. at 10).

Respondent Trustees of Rex Hospital ("Rex") is a public, non-profit, tax-exempt hospital located in Raleigh, North Carolina, whose trustees are appointed by the city council of the City of Raleigh, subject to approval of the senior resident judge of the Wake County Superior Court. Rex is engaged in offering "general medical-surgical hospital services to the public in Raleigh, North Carolina." (App. at 10.) Respondent Joseph Barnes is the administrator of Rex, and respondent Richard Urquhart is a member of the board of trustees of Rex. Both men are local residents of Raleigh, North Carolina. (App. at 10 and 11.) Respondent George Stockbridge is an officer of the Health Planning Council for Central North Carolina, and is a resident of Durham, North Carolina. (App. at 11.)

2. *The Conduct Complained of*

In this action, filed pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), petitioner seeks damages in excess of $2 million and injunctive relief for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The complaint specifically alleges the claimed conspiracy had the effect

of restraining the provision of "*additional* medical-surgical hospital services" (App. at 24-25; emphasis added) planned to be provided by the expansion of Mary Elizabeth Hospital in the "Raleigh area," expressly defined as "the area comprising Wake County in the State of North Carolina." (App. at 12.)

In 1971, petitioner alleges it planned to relocate and expand Mary Elizabeth Hospital from a forty-nine bed facility to a one hundred and forty bed facility. (App. at 18.) Pursuant to then effective North Carolina law,[3] any person that desired to increase the number of hospital beds in North Carolina was required to apply for a "Certificate of Need" from the North Carolina Medical Care Commission ("the Commission"), a state agency. (App. at 16.)

On November 4, 1971, petitioner applied to the Commission for a Certificate of Need, "for the construction of 91 additional medical-surgical beds." (App. at 18.) Pursuant to the Certificate of Need Law, petitioner's application was referred to the Health Planning Council for North Carolina ("The HPC") for its recommendations on the application. (App. at 18.)

Petitioner alleges that respondent Rex and alleged unnamed co-conspirator Wake Memorial Hospital ("Wake")[4] and other respondents and alleged co-conspirators had "caused the Health Planning Council for Central North Carolina to become a means" for furthering the alleged conspiracy (App. at 16) by defeating petitioner's application for expansion before the Commission (App. at 17), by obtaining approvals on applications for expansion by Rex and Wake, and by taking "all steps necessary to prevent" petitioner "from utilizing its Certificate of Need, including baseless and unwarranted actions before courts, county and municipal authorities and other administrative agencies in the name" of HPC. (App. at 17.)[5]

[3] The "Certificate of Need" law, Sections 90-289, *et seq.*, Title 21, General Statutes of North Carolina, has since been declared unconstitutional under the Constitution of North Carolina by the North Carolina Supreme Court. *See In the Matter of Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (S.Ct.N.C. 1973).

[4] Wake Memorial Hospital is located in Raleigh, North Carolina. (App. at 11.)

The complaint alleges that respondent Rex and alleged co-conspirator Wake conspiratorially filed bad faith oppositions to petitioner's application before the HPC, and respondents and co-conspirators conspired to cause and caused the HPC to file a negative recommendation on petitioner's application with the Commission. (App. at 19.) Such negative "recommendation was intended to and did delay and forestall the capacity of plaintiff [petitioner] to compete effectively in the Raleigh area." (App. at 19.)

Subsequently, on February 27, 1972, the Commission held a hearing on petitioner's application for an additional ninety-one beds. (App. at 19.) Allegedly, in furtherance of the conspiracy, the HPC appeared before the Commission and opposed petitioner's application. (App. at 19.) It is alleged that, as part of the purported conspiracy, respondent Rex and Wake requested the Commission to continue the hearing on petitioner's application, so that they could present additional evidence. (App. at 20.) The Commission continued its hearing on petitioner's application to June 12, 1972,

[5] The Complaint alleges the conspiracy between respondent Rex and Wake was formed in 1970 with the formation of the Joint Long Range Hospital Committee, which published a report concerning the provision of additional hospital services in Wake County. (App. at 15-16.) Allegedly, the object of the conspiracy was to allocate the purported market for hospital services between Rex and Wake "to the exclusion of Plaintiff [petitioner]." (App. at 16.) Petitioner does not allege that any act, other than publication of a report, was undertaken under the aegis of the Joint Long Range Planning Committee.

at which time respondent Rex presented evidence in opposition to the application. (App. at 20.)

The Medical Care Commission approved petitioner's application on June 30, 1972. (App. at 21.) As part of the alleged conspiracy, HPC appealed the order of the Commission approving petitioner's Certificate of Need to the Superior Court of Wake County. (App. at 23.) Petitioner concedes this appeal was dismissed in February 1973, after the decision of the North Carolina Supreme Court invalidating the Certificate of Need Law. (Br. at 9.)

In its Brief (Br. 9, n.11), petitioner does not deny that neither petitioner nor respondents nor any other person obtained a stay of the Commission's approval of petitioner's application to expand. Petitioner alleges only that HPC appealed the Commission's approval. Petitioner could have initiated its expansion of Mary Elizabeth on June 30, 1972, particularly because such appeal was allegedly "without basis in law and fact." (App. at 23.)

The complaint, filed on October 10, 1972, asserts that the alleged conspiracy continued, citing as factual support the then pending appeal of petitioner's approval for expansion (App. at 23), Rex' application for expansion of its facilities by 109 beds (App. at 22), and the alleged adverse publicity generated by Rex and Wake which was created by statements that Rex and Wake could meet the future hospital service needs of Wake County. (App. at 24.) Petitioner does not allege the manner in which such statements evoked adverse publicity against it or prevented it from initiating its construction. Petitioner alleges that the State of North Carolina estimated an additional 409 beds were needed in Wake County. (App. at 19.) Therefore, Rex' application for a one hundred and nine bed expansion, according to the complaint allegations, did not prevent petitioner from

initiating its expansion. The vehicle by which respondents allegedly effectuated their alleged conspiracy, the Certificate of Need Law, has been invalidated.

3. *The Product and Geographic Markets in Which the Alleged Conspiracy Occurred*

Petitioner's complaint is clear that the conduct complained of, the alleged conspiracy to prevent the expansion of Mary Elizabeth Hospital, was directed at and affected only the provision of *additional* hospital services by Mary Elizabeth Hospital in the "Raleigh area," defined in the complaint as "Wake County, in the State of North Carolina." (App. at 12.) Count I of the complaint alleges that respondents engaged in a ". . . conspiracy in unreasonable restraint of the . . . trade and commerce in the furnishing of medical-surgical hospital services . . . ." (App. at 14.) Count II alleges that the purported conspiracy was undertaken at the direction and instigation of respondent Rex and "such acts constitute an attempt by defendant [respondent] Rex to monopolize and to conspire . . . to attempt to monopolize, the paid hospital business . . . in the Raleigh area. . . ." (App. at 26.)

It is alleged that the effect of the conduct complained of was ". . . to prevent and restrain competition in the furnishing of *additional* medical-surgical hospital services to the public . . ." (App. at 24; emphasis added) and to delay petitioner ". . . from proceeding with construction of the additional medical-surgical hospital beds. . . ." (App. at 25.) The alleged illegal acts and the hospital services affected thereby were all geographically limited to Wake County. (App. at 12 and 24-25.)

The only business allegedly carried on by Mary Elizabeth Hospital is the provision of hospital services in Raleigh, North Carolina. Moreover, the conduct complained of was allegedly directed at only that business.

B. Proceedings in the District Court and the Court of Appeals

On January 2, 1973, respondents, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, filed motions and supporting memoranda to dismiss the complaint for lack of subject matter jurisdiction. Petitioner, on January 29, 1973, filed a detailed factual amendment to the jurisdictional allegations of its complaint. (App. at 34-38.)

Respondents filed amendments to their motions to dismiss, and oral argument was held on February 22, 1973, in the Raleigh Division of the Federal District Court for the Eastern District of North Carolina. During oral argument, petitioner advised the district court that it had amended its complaint to be conclusive with respect to the jurisdictional requirements under the Sherman Act. (Transcript before District Court, Civil No. 4048, February 22, 1973, at p. 26, quoted *infra* at p. 52, n. 37.)

On March 23, 1973, the district court entered its order granting respondents' motions to dismiss, and stating: "the conduct of defendants [respondents] complained of in this case directly affects only a local activity of the plaintiff [petitioner] and only incidentally and insubstantially does it affect interstate commerce." (App. at 48-49.)

Upon appeal by petitioner, the United States Court of Appeals for the Fourth Circuit, on February 6, 1974, affirmed *per curiam* the order of the District Court. (App. at 50.) On June 11, 1974, the Fourth Circuit Court of Appeals granted petitioner's application for a rehearing *en banc* and withdrew its prior opinion. (App. at 51.)

After submission of supplemental briefs and oral argument, the court below sitting *en banc* again affirmed dismissal of petitioner's complaint. The court below

found that the alleged conspiracy restrained only the "provision of surgical-medical hospital services in the Raleigh area," and such services are "a local, intrastate activity, not interstate commerce." (App. at 57-58.) The dissent expressly agreed with the finding of the majority that the alleged conspiracy did not operate "in commerce." (App. at 67, n.2.)

In determining whether the wholly intrastate conduct complained of substantially and adversely affected interstate commerce, the court below looked to what effect the alleged conspiracy to restrain hospital services would have on each of "the *specific line*[*s*] of commerce involved" in the provision of hospital services. (App. at 61, n.7; emphasis in original) The court concluded that the alleged conspiracy did not substantially affect commerce in any line of interstate commerce with which Mary Elizabeth had contact. (App. at 61.)

Further, after analyzing the alleged conspiracy, the court concluded, on the basis of the express and clear complaint allegations, that respondents "can do no more than delay, at most, whatever expansion seems economically wise to plaintiff [petitioner]." (App. at 64.) Contrary to petitioner's suggestion (Br. at 14), the majority below found the "object" or "subject" of the conspiracy was not "controlling" but merely "relevant" to the jurisdictional inquiry. (App. at 60.)

SUMMARY OF ARGUMENT

I. Subject matter jurisdiction under the Sherman Act is present only where the alleged conduct complained of has occurred in the flow of interstate commerce or if wholly intrastate, substantially and adversely affects interstate commerce. This jurisdictional inquiry under the Sherman Act differs significantly from that required when Congress itself has defined a class of activities which affect commerce. Where Congress itself has defined a class of activities as affecting commerce, the judicial

inquiry is not confined to specific conduct before the court but rather is focused on whether Congress had a rational basis for determining that the entire class of activities, considered in the aggregate, substantially affects commerce. In enacting the Sherman Act, Congress did not state in the Act that it applied in every situation where a company had some minimum contacts with interstate commerce. Rather, Congress left the courts to determine on a case-by-case basis whether the specific conduct alleged in the case before the court occurs in the flow of commerce or, if not, whether it substantially and adversely affects interstate commerce. The Act looks to the alleged unlawful conduct itself and requires a specific jurisdictional determination.

II. A. The conduct complained of in the instant case did not occur in the flow of interstate commerce. The complaint, as amended, alleges that respondents conspired to restrain the provision of hospital services in Raleigh, North Carolina, by preventing petitioner from expanding Mary Elizabeth Hospital in Raleigh, North Carolina, from a forty-nine bed facility to a one-hundred-and-forty bed facility. The means allegedly used to achieve the claimed purpose involved filing bad faith oppositions to petitioner's application for expansion with a state agency. It is not alleged that the claimed conspiracy sought to achieve its wholly intrastate objective by interfering with petitioner's use of out-of-state supplies or the financing and receipt of insurance payments. There was no alleged conspiracy to fix the prices or otherwise restrain trade in drugs or medicines purchased by petitioner in interstate commerce, or to control insurance payments coming across state lines to petitioner. The parties to the alleged conspiracy are all residents of the Raleigh area and not connected with out-of-state co-conspirators. The complaint alleges a wholly intrastate conspiracy to restrain a localized and personal service and is, therefore, outside the jurisdiction of the Sherman Act.

II. B. In the course of providing hospital services, petitioner utilized supplies and equipment that were shipped into North Carolina from out of state. Petitioner also treated patients who qualified for Medicare and Medicaid and who had health insurance with out-of-state insurance companies. These contacts with out-of-state activities did not transform the provision of hospital services in a local area into an interstate activity. The recent decision of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), is not applicable to the instant case.

III. The alleged conspiracy related only to preventing petitioner from expanding the size of its facility by a total of ninety-one beds and did not substantially and adversely affect the flow of commerce in goods, supplies, and financing. The conspiracy had no adverse effects on any of the interstate markets in which petitioner's hospital purchased goods and services. Precedent of this Court in *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g* 95 F. Supp. 103 (D. Oregon 1950) and *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), and substantial precedent in the lower courts have held that each interstate contact upon which petitioner relies for jurisdiction is insufficient.

The receipt of federal funds under Medicare and Medicaid, federal programs under the General Welfare Clause and not the Commerce Clause, cannot be used to transform an otherwise local activity into one subject to Sherman Act jurisdiction.

IV. The district court and the court below clearly dismissed petitioner's complaint for failure to satisfy the interstate commerce jurisdictional requirements of the Sherman Act and properly did so under Rules 12 (b) (1) and (b) (6) on the complaint allegations. Substantial precedent supported the district court's decision and, in a well reasoned opinion, the Appellate Court, *in banc*, affirmed. Moreover, during oral argument before the district court, petitioner requested the district court to rule on the motions to dismiss.

ARGUMENT

I. JURISDICTION UNDER THE SHERMAN ACT MAY BE INVOKED ONLY ON A CASE-BY-CASE BASIS, AND ONLY WHEN THE CONDUCT COMPLAINED OF OCCURS IN INTERSTATE COMMERCE OR, IF WHOLLY INTRASTATE, SUBSTANTIALLY AND ADVERSELY AFFECTS INTERSTATE COMMERCE.

Subject matter jurisdiction is present under Sections 1 and 2 of the Sherman Act only: (1) when the conduct complained of occurs *in* the flow of interstate commerce; or (2) when the conduct complained of "however local its immediate object, . . . substantially and adversely affects interstate commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974). *See also Burke* v. *Ford*, 389 U.S. 320, 321 (1967); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).[6] Petitioner does not contest these standards for determining jurisdiction under the Sherman Act. (Br. at 21.)

Petitioner argues that the test of jurisdiction under the Sherman Act "is one of Congressional power" because " 'Congress wanted to go to the utmost extent of its Constitutional power . . .' " in enacting the Sherman Act and, therefore, the decision below is a determination that "Congress is without power under the commerce clause to reach the alleged conduct." (Br. at 20-21.) This argument is inaccurate and ignores the

[6] *See, e.g., Greenville Publishing Co., Inc.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 395 (4th Cir. 1974); *United States* v. *Bensinger Co.*, 430 F.2d 584, 588 (8th Cir. 1970); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964); *Yellow Cab Co. of Nevada* v. *Cab Emp., Auto & W., Local #881*, 457 F.2d 1032 (9th Cir. 1972).

fundamental distinction between Congressional legislation under the Commerce Clause, and the specific judicial inquiry necessary for jurisdiction under the Sherman Act. Acceptance of petitioner's argument would require federal courts to exercise jurisdiction over every alleged restraint of trade, regardless of its effect upon interstate commerce.

Under the Commerce Clause, Congress may enact a regulatory scheme encompassing particular local practices which, individually, are not in commerce and have no substantial affect on interstate commerce.[7] As long as the "total incidence" of the class of activities subject to legislative regulation substantially affects interstate commerce,[8] Congressional power is properly exercised under the Commerce Clause. In these situations, unlike the Sherman Act, the necessary substantial effect on interstate commerce is established by "measuring" the incidence on commerce of the aggregate class of activities being regulated, not by measuring the effect on commerce of each practice alleged in a particular complaint.

For example, in *Perez* v. *United States*, 402 U.S. 146 (1971), petitioner challenged his conviction for "loan sharking" under Title II of the Consumer Protection Act (18 U.S.C. §§ 891 *et seq.*) as unconstitutional, arguing that his "loan sharking" conduct had no substantial affect on interstate commerce and was, therefore, not constitutionally subject to legislative proscription. Re-

[7] *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-6 (1970); Title II of the Consumer Protection Act, 18 U.S.C. §§ 891 *et seq.* (1970); the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (1970); and the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1970).

[8] *Maryland* v. *Wirtz*, 392 U.S. 183, 190 (1968), quoting from *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964). *See also Perez* v. *United States*, 402 U.S. 146, 155 (1971).

ferring to *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court emphasized that "it was the *class of activities* regulated that was the measure" (emphasis in original) and that "Congress [may] appropriately consider . . . the 'total incidence' of the practice on commerce." 402 U.S. at 154. The Court explained:

> Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class. *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968). (*Perez* v. *United States*, 402 U.S. at 154; emphasis in original.)

Also, in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), petitioner argued that the 1961 amendment to the Fair Labor Standards Act was beyond Congress' power under the Commerce Clause because it expanded the Act's coverage to include "every employee who 'is employed in an enterprise engaged in commerce or in the production of goods for commerce'" (392 U.S. at 188; footnote omitted) and, therefore, included employees having no relationship to or effect on interstate commerce. The Court stated:

> *Darby* [*United States* v. *Darby*, 312 U.S. 100 (1941)] itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is 'within the reach of the federal power.' The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 648; *Katzenbach* v. *McClung*, *supra*, at 301. (392 U.S. at 192-93; footnotes omitted.)

The Court in *Maryland* v. *Wirtz*, *supra*, further stated that where Congress has itself determined that a class

of activities in total[9] has a substantial effect on interstate commerce, the Court will accept as conclusive that Congressional finding so long as Congress has "'. . . a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . .'" (392 U.S. at 190; footnote omitted, quoting from *Katzenbach* v. *McClung*, *supra*.)

In cases where Congress has enacted legislation regulating a class of activities, including wholly intrastate activities having individually no substantial effect on interstate commerce, the judicial inquiry is not limited to the specific conduct complained of, but looks to the entire class of activities of which the individual practice reflects only a representative example.[10] No "case-by-case determination" is made as to whether the specific conduct which is the subject of the complaint before the court is in interstate commerce or even substantially affects interstate commerce. *See Katzenbach* v. *McClung*, 379 U.S. 294, 302-303 (1964).

---

[9] *See also Wickard* v. *Filburn*, 317 U.S. 111, 127-28 (1942), where the Court stated:

> The effect of the statute before us [the Agricultural Adjustment Act of 1938, 55 Stat. 203 (1938)] is to restrict the amount [of wheat] which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

[10] *See Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 648 (1944), where the Court indicated that the determination of whether jurisdiction is present under the National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*) is not confined to the facts alleged in the complaint before it. Rather, the Court may consider whether the "immediate situation is representative of many others throughout the country, *the total incidence of which if left unchecked may well become* far reaching in its harm to commerce." (Emphasis added.)

The Sherman Act presents a far different test, for Congress did not define a class of activities as substantially affecting commerce. "The jurisdictional inquiry under general prohibitions like . . . the Sherman Act . . . differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974). Under the Sherman Act, the jurisdictional inquiry turns "* * * on the circumstances presented in each case * * *" and requires "* * * a particularized judicial determination * * *" (419 U.S. 197, n.12) of whether the conduct complained of occurs in interstate commerce or "* * * substantially and adversely affects interstate commerce * * *" (419 U.S. at 195).

Thus, in determining whether the jurisdictional requirements of the Sherman Act have been met, courts, including this Court, have measured whether the specific conduct complained of operates in or substantially and adversely affects interstate commerce, not whether such conduct is a part of a class of activities which, in toto, would be in commerce, or, in toto, substantially affect commerce. For example, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court, in rejecting Sherman Act jurisdiction over local conduct of several multistate taxicab companies (marketers and operators), did not look to the possible class or group of taxicab activities of which Yellow Cab would be but a representative example, but rather looked only at the conduct before it and found that such conduct, in itself, did not substantially and adversely affect or burden interstate commerce. 332 U.S. at 231-233. Similarly, in *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), in affirming a denial of Sherman Act jurisdiction over statewide activities involving prepaid medical and hospital services (which included the provision of hospital care),

the Court examined only the activities before it and whether they amounted to a substantial impact on interstate commerce. 343 U.S. at 338-339. Under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "NLRA"), however, the test for jurisdiction would have been quite different and would have included a determination based on the entire class of activities within the industry. *See N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 604 (1939); *Maryland* v. *Wirtz*, 392 U.S. 183, 192-193 (1968). *See Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (where the Court looked to "whether, in the circumstances pleaded" (*Id.* at 221), and whether "the material facts pleaded" (*Id.* at 222) demonstrated a substantial and adverse effect on interstate commerce).[11]

The jurisdictional inquiry in the instant case, therefore, is confined to the specific conduct complained of by petitioner, and whether that alleged conduct in and of itself, either is in the flow of interstate commerce or substantially and adversely affects it. Such a determination does not limit the legislative power of Congress under the Commerce Clause. Unlike the NLRA and other similar statutes (*see supra* at p. 13 n.7), Congress has made no attempt under the Sherman Act to declare legislatively that local intrastate restraints of trade are a substantial burden upon interstate commerce.

The *amicus curiae* Federation of American Hospitals, in its brief, disregards the specific inqury required under

---

[11] *See also Rasmussen* v. *American Dairy Ass'n*, 472 F.2d 517, 527 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973) (where the court analyzed ". . . the extent to which prohibition of the defendants' specific conduct is justifiable as a means of protecting the specific line of interstate commerce involved," and stated "in this area, perhaps more than most, each case must turn on its own facts." (*Id.* at 526.)) *See Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973).

the Sherman Act and the complaint allegations herein. It asserts that jurisdiction is present under the Sherman Act because: (1) the National Labor Relations Board has exercised jurisdiction under the NLRA (29 U.S.C. §§ 151 *et seq.*) over labor disputes in hospitals receiving a certain amount of gross revenues annually (Federation Brief at 21); and (2) Congress has enacted "other pieces of comprehensive legislation which affect hospitals throughout the United States." (*Id.*)

With respect to its argument relating to the NLRA, the Federation relies heavily upon *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (Federation Brief at 24-25). In *Butte Medical, supra*, the NLRB determined it had jurisdiction by analyzing the total effect on interstate commerce of all 970 proprietary hospitals [12] in the United States. Thus, the jurisdictional test utilized in *Butte Medical* has no application herein.

Moreover, the Federation's contention ignores the significant differences between the language of the NLRA and the Sherman Act. Under the NLRA (29 U.S.C. § 152(6)), "commerce" is defined as:

> . . . trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

[12] In *Butte Medical*, 168 N.L.R.B. 266, 268, the NLRB stated:

> While the purchases made by a particular proprietary hospital may not directly involve interstate commerce, the aggregate purchases of all such facilities clearly have a substantial impact on the operations of the various supplying industries and involve substantial shipments of goods and supplies in interstate commerce.

And "affecting commerce" (29 U.S.C. § 152(7)),

> . . . means in commerce, or burdening or obstructing commerce or the free flow of commerce, *or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.* (Emphasis added.)

In contrast, Congress did not define interstate commerce jurisdiction under the Sherman Act, but left the courts to determine when any alleged unlawful conduct either occurred in commerce or substantially and adversely affected commerce. (*See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974).)

Because of the significant differences between the language and purposes of the NLRA and the Sherman Act, courts have squarely rejected the arguments made by the Federation. For example, this Court and the Court of Appeals for the Seventh Circuit have ruled on the jurisdictional reach under the NLRA and the Sherman Act as to the taxicab industry. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court held that the activities of a taxi company carrying interstate passengers from one interstate railroad terminal to another are in the flow of interstate commerce for purposes of the Sherman Act, but the activities of the same taxicab company in carrying interstate passengers from their homes or offices to the interstate terminal, and vice versa, are not sufficient to come within the Sherman Act.

In *Evanston Cab Co.* v. *City of Chicago*, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964), the court, in reliance on *United States* v. *Yellow Cab Co.*, found that an alleged restraint of taxicab services to and from O'Hare Airport to homes and offices in Chicago was outside the jurisdiction of the Sherman Act. The court in *Evanston* specifically rejected plaintiff's argument that because the court had ruled taxicab services were within the jurisdictional ambit of the NLRA, a restraint of such services also satisfied the jurisdic-

tional tests of the Sherman Act. (325 F.2d at 911.) In rejecting plaintiff's argument in *Evanston*, the Seventh Circuit specifically referred to the broad definitions of "commerce" and "affecting commerce" in Section 2 of the NLRA, 29 U.S.C. §§ 152(6) and (7). (325 F.2d at 912). Under the NLRA, the entire cab company's business was relevant, but under the Sherman Act, only that part of the cab company's business affected by the alleged restraint was relevant.

The distinction between the jurisdictional requirements under the NLRA and the Sherman Act is further emphasized by the number of other cases holding, in essentially similar factual contexts, jurisdiction to be present under the NLRA but not under the Sherman Act. *Compare, N.L.R.B.* v. *Pierce Bros.*, 206 F.2d 569 (9th Cir. 1953) (where the court found NLRA jurisdiction existed over a local mortuary company because it recevied mortuary supplies and shipped some corpses out of state) *with John Kalin Funeral Home, Inc.* v. *Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert. denied*, 404 U.S. 881 (1971) (where the court found it lacked jurisdiction over an alleged conspiracy in violation of the Sherman Act to restrain a local mortuary business that obtained supplies and shipped corpses out of state and had regular interstate communications); and *compare N.L.R.B.* v. *Inglewood Park Cemetery Association*, 355 F.2d 448 (9th Cir. 1966) (where the court found NLRA jurisdiction existed over a company engaged in the operation of a cemetery because the company sold burial lots and crypt spaces and purchased $3,086 of related items from out of state) *with Lawson* v. *Woodmere*, 217 F.2d 148 (4th Cir. 1954) (where the court found it lacked jurisdiction over an alleged conspiracy in violation of the Sherman Act to restrain the local sale of funeral vaults, even though plaintiff was engaged in purchasing and selling concrete and metal burial vaults and boxes which were purchased from out of state).

The foregoing comparisons make clear that decisions finding the presence of jurisdiction under the NLRA are not probative of jurisdiction under the Sherman Act. The Federation is requesting the Court to expand the jurisdiction of the Sherman Act beyond that defined by former precedent and to utilize precedent interpreting the jurisdictional standards of other federal legislation, having substantial differences in language and completely different purposes, to determine whether petitioner's complaint herein meets the jurisdictional requirements of the Sherman Act. The argument should be rejected, and the long established and clear Sherman Act standards should be applied in the instant case. As stated in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353 (1941), by Mr. Justice Frankfurter, wriing for the Court:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system.

II. THE CONDUCT COMPLAINED OF OCCURRED ONLY INTRASTATE AND NOT IN THE FLOW OF INTERSTATE COMMERCE.

A. The Alleged Conspiracy Operated Wholly Within the Raleigh Area and Upon the Provision of a Localized and Personalized Service.

The complaint unequivocally sets forth the alleged product and geographic markets in which the claimed conspiracy and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act operated. It is alleged that respondents "engaged in an unlawful combination

and conspiracy in unreasonable restraint . . . in the furnishing of medical-surgical hospital services. . . ." (App. at 14.) Petitioner also alleges that respondent Rex directed and instigated the alleged conspiracy and such direction and instigation constitutes an attempt "to monopolize and to conspire . . . to attempt to monopolize the paid hospital business conducted . . . in the Raleigh area." (App. at 26.) The complaint categorically defines the relevant geographic market as the "Raleigh area" meaning "the area comprising Wake County, in the State of North Carolina." (App. at 12.)

The "hospital services" product market which is the sole subject of the alleged conspiracy consists of ". . . providing medical and surgical care to persons in need of short term medical treatment or surgery." (App. at 12.) The rendition of hospital services does not occur across state lines, but at Mary Elizabeth Hospital in Raleigh, North Carolina. According to the complaint, hospital services, the product allegedly restrained, is a localized and personalized service provided at a fixed location within Wake County.

The alleged conspiracy to restrain the provision of additional hospital services by Mary Elizabeth Hospital was purportedly effectuated by conspiratorially opposing petitioner's application to expand its facilities from forty-nine to one hundred and forty beds. (*See supra* at 3-7.) It is not alleged, nor could it be alleged, that the purported conspiracy sought to achieve its wholly intrastate object by regulating the alleged supplies, equipment, or financing for expansion of the new hospital, or by regulating Medicare, Medicaid or out-of-state health insurance payments.

Thus, the complaint alleges a conspiracy of local Raleigh residents to prevent another Raleigh resident from providing additional hospital services in the Raleigh

area. The means adopted to effectuate the purpose of the alleged conspiracy do not traverse state lines or involve goods or services travelling in the flow of interstate commerce. Accordingly, the alleged conspiracy operated wholly in Wake County, within North Carolina.

Precedent of this Court has held that a local intrastate conspiracy to restrain the provision of prepaid medical services does not operate in commerce. In *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Oregon 1950), it was alleged that a state-wide society of doctors had conspired to restrain the provision of prepaid medical services in Oregon, including medical, surgical and hospital care. (343 U.S. at 330.) It was there claimed that the restraint prevented other organizations from offering "prepaid medical, surgical and hospital care and allied services. In the absence of the restraints hereinafter described, the State of Oregon would constitute a substantial market for the prepaid medical business of such organizations." 95 F. Supp. at 122. It was further found:

> [O]rganizations doing prepaid medical insurance business in the State of Oregon use interstate transportation and transmission facilities to transmit across state lines policies, reports, instructions, and correspondence. . . . Medical care policies and payments thereon by policyholders regularly flow in interstate commerce between the State of Oregon and other states. Prepaid medical poliices issued by Oregon organizations cover reimbursement for medical care required by Oregon residents while in other states. Said Oregon organizations arrange to pay for said medical care rendered by doctors, hospitals, and others in other states. * * * Organizations engaged in the sale and furnishing of prepaid medical care in Oregon . . . purchase and procure medicines, drugs, medical supplies and instruments

> shipped from other States into the State of Oregon. * * * Doctors practicing in Oregon treat patients who have come from other states to secure medical care in Oregon. (95 Supp. at 114-115).

In *Oregon Medical*, the Supreme Court affirmed the finding that the conduct complained of did not substantially affect interstate commerce for Sherman Act purposes. 343 U.S. at 338-339.

Substantial lower court precedent has also held that an alleged conspiracy to restrain the provision of hospital services provided in a geographic area wholly within a state does not operate in commerce.[13] Petitioner attempts to avoid the application of this precedent by arguing, in effect, that these decisions are outdated. (Br. at 42.) The analyses of the provision of hospital services made by the courts are surely not "outdated." Hospitals then and now buy some goods and drugs that originate from out of state and receive medical insurance payments from out of state. The provision of hospital services remains a personal, localized activity at a fixed location.

Contrary to the implications in petitioner's Brief (Br. at 42) that "the majority below" misconceived the nature of providing hospital services, the entire court below concluded that the alleged conspiracy to restrain the provision of hospital services by Mary Elizabeth

[13] *See, e.g., Spears Free Clinic and Hospital for Poor Children* v. *Cleere*, 197 F.2d 125 (10th Cir. 1952); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956), *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F. Supp. 103 (D. Ore. 1950); *Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973).

did not occur in commerce and failed to satisfy that initial Sherman Act jurisdictional test.

Respondents are not herein arguing, and the court below did not conclude, that a conspiracy to restrain the provision of hospital services is, as a matter of law, incapable of occurring in interstate commerce. The determination turns upon the facts and complaint allegations in each case. For example, in *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973), plaintiff hospital alleged a conspiracy ". . . to control the area's hospital services" (*Id.* at 49) and ". . . to close down Doctors Hospital [Plaintiff therein] and to close down and limit operations of other area hospitals as well." (*Id.* at 51.) The alleged conspiracy in *Doctors, Inc., supra*, operated in a geographic and product market which included the provision of hospital services furnished by approximately one hundred (100) hospitals in an interstate geographic market consisting of eight counties located in Pennsylvania and New Jersey. (490 F.2d at 49, n.1, and 51.) The alleged conspiracy in *Doctors, Inc., supra*, was found to operate in interstate commerce. In contrast, the conspiracy alleged by petitioner does not operate in interstate commerce.

Courts have consistently followed the same analytical approach taken in the court below when deciding Sherman Act jurisdictional questions in other areas. The jurisdictional inquiry has been focused on the relevant product and geographic markets defined in the complaint allegations. The fact that a particular plaintiff, such as Mary Elizabeth Hospital herein, is engaged in other interstate activities, such as the purchase of materials and equipment from out of state, which are not the subject of the alleged conspiracy, does not place the alleged conspiracy in commerce. Jurisdiction under Sections 1 and 2 of the Sherman Act is not triggered by the persons

or companies involved in the suit but by the conduct complained of.[14]

For example, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the goverenment's complaint alleged that defendants, who were interstate marketers and operators of taxis, controlling a majority of taxicab licenses in Chicago, Pittsburgh, and Minneapolis, had engaged in a conspiracy to restrain and monopolize the sale of automobiles for use as taxicabs in Chicago, Pittsburgh, New York, and Minneapolis and the furnishing of cab services in Chicago and vicinity. (*Id.* at 220 and 224.) With respect to the alleged Chicago area conspiracy, it was claimed that the taxicab companies had agreed not to compete for the transportation of passengers between interstate train terminals in Chicago and had conspired to control the principal cab companies in Chicago and to exclude others from the transportation of passengers to and from Chicago train terminals. (*Id.* at 228 and 230.) Looking to each of the alleged conspiracies and the alleged relevant product and geographic markets, the Court found there was Sherman Act jurisdiction over the conspiracy to restrain cab service between two interstate railroad terminals in Chicago, but no jurisdiction over the alleged conspiracy to restrain cab service provided to passengers going from their homes to the interstate railroad terminals. The fact that the companies were interstate companies was irrelevant.

Similarly, in *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs alleged that

[14] Quoting language from *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), defining the language "engaged in commerce" as used in Section 7, Clayton Act, referring to a "corporation engaged in commerce," petitioner argues that Mary Elizabeth purchases goods and services from out of state, and therefore arguably satisfied the jurisdictional standard of Section 7, Clayton Act. As discussed in the text, the jurisdictional standards under the Sherman Act are in issue herein, and those standards are invoked by the specific conduct alleged in the complaint, not by the overall business of the parties involved in the action.

defendants, 105 local newspapers and their trade association, conspired to restrain competition in legal advertising in Los Angeles County and to monopolize that market. Plaintiffs, suing on behalf of a defunct newspaper, alleged that its newspaper had operated in interstate commerce because it purchased ink, newsprint and other material from out of state and had out-of-state subscribers. It contended that the out-of-state supplies were an integral part of publishing the newspaper and transformed the local business of legal advertising into an interstate business. The court observed that the restraints alleged "were on a purely local level and were wholly directed to [a] local intrastate market." (*Id.* at 330.) It then held:

> The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.
>
> * * * *
>
> Appellant [seeks to] . . . lay down a simple rule that if a newspaper is engaged in interstate commerce it is entitled to the protection of the antitrust laws no matter where the particular restraint is applied. (*Id.* at 330.)[15]

In cases where the "in commerce" standard of Sherman Act jurisdiction has been satisfied, the alleged conspiracies have had as their subjects goods or services moving across state boundaries or the alleged conspira-

[15] *Accord, Yellow Cab Co. of Nevada* v. *Cab Emp., Auto. & W., Local #881*, 457 F.2d 1032, 1034 (9th Cir. 1972); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 272 (2d Cir. 1964); *Cotillion Club, Inc.* v. *Detroit Real Estate Board*, 303 F. Supp. 850, 853 (E.D. Mich. 1964); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n.*, 302 F. Supp. 1276, 1279 (E.D. Mich. 1969), *aff'd per curiam*, 442 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 827 (1970); *Hotel Phillips* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd per curiam*, 301 F.2d 443 (8th Cir. 1962).

cies, in their formation, have involved persons or companies in more than one state. For example, in *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945), defendants, in-state alcoholic beverage wholesalers and retailers, responsible for seventy-five percent of the alcoholic beverages sold in Colorado, virtually all of which were shipped into Colorado by out-of-state suppliers, conspired to fix the prices, markups and margins of profit on the sale of such beverages and enforced the price fixing conspiracy by forcing out-of-state beverage producers to enter into and to enforce fair trade contracts fixing prices at the conspiratorially set levels. (*Id.* at 295.) *See also Lehrman* v. *Gulf Oil Corp.*, 464 (F.2d 26, 32 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (where plaintiff was purportedly injured by an alleged conspiracy among Gulf Oil Corporation and its dealers throughout the Southwestern Region of the United States); and *A. Cherney Co.* v. *Chicago & Sub. Refuse Dis. Ass'n.*, 484 F.2d 751 (7th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974) (where the plaintiff alleged defendants, refuse collectors, their trade association and out-of-state equipment manufacturers, conspired "to restrain and monopolize the private scavenger business within the geographic area including Chicago, its suburbs, parts of Indiana and Wisconsin . . . and St. Joseph, Missouri . . . ." (*Id.* at 752-53, n.1) and where the in-state defendants allegedly coerced the out-of-state equipment manufacturers to refuse to deal with plaintiffs).[16]

In the instant case petitioner does not contend that the alleged conspiracy involved local residents and out-of-state suppliers. The complaint alleges a conspiracy having as its object the restraint of the provision of hospital services in Wake County, North Carolina, allegedly effectuated by bad faith oppositions to Mary Elizabeth

[16] *See also Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3d Cir. 1973); *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

Hospital's application for expansion before local state agencies. The conduct complained of by petitioner did not occur in commerce.

B. The Use of Out-of-State Supplies and Receipt of Insurance Payments Does Not Transform the Provision of Hospital Services in Wake County into Interstate Commerce.

Petitioner avoids focusing on the product and geographic markets in which the conspiracy allegedly operated. Instead, petitioner argues that in the course of providing hospital services in Wake County, North Carolina, Mary Elizabeth Hospital utilizes out-of-state supplies and equipment and treats patients who qualify for Medicare and Medicaid or who have health insurance with out-of-state health insurance companies. (Br. at 23-28 and 40-44.) These activities of Mary Elizabeth Hospital, it is concluded, transform the provision of hospital services in Wake County, North Carolina, into interstate commerce such that any restraint of any portion of Mary Elizabeth's hospital services must of necessity be in commerce. Petitioner invokes (Br. at 27) the talismanic phrase that "the provision of these hospital services is an integral part of interstate transactions," relying upon *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

Petitioner makes the identical argument that has been rejected by virtually every court that has considered it, and if accepted would bring every alleged restraint of trade, whether intrastate or interstate, within Sherman Act jurisdiction. In *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs argued that the alleged conspiracy to monopolize the legal advertising market in Los Angeles County operated in the flow of interstate commerce because plaintiffs' defunct newspaper had utilized out-of-state newsprint and ink, and that such out-of-state supplies were an integral part of publishing the newspaper and transformed the

local business of legal advertising into an interstate business. The court rejected this argument, looking to the product and geographic markets in which the alleged conspiracy operated. (*Id.* at 330.) The alleged conspiracy did not involve the out-of-state purchases and only affected them indirectly.

Likewise, in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), plaintiff operated a garbage pickup and disposal and container leasing business in Clark County, Nevada. It alleged that defendant, a competitor of plaintiff, had conspired in violation of Sections 1 and 2 of the Sherman Act to monopolize the business. Plaintiff alleged that it purchased its containers from out-of-state and that the alleged conspiracy of defendant directed at the local activity of plaintiff operated in interstate commerce because it interfered with plaintiff's purchase of the out-of-state containers. (*Id.* at 343.) The court rejected plaintiff's contention, stating "Appellant supplied this [local] business with equipment from out of state. This fact alone does not turn what was really a local activity into an interstate one." (*Id.* at 343.)[17] *Compare, United States* v. *Bensinger*, 430 F.2d 584 (8th Cir. 1970) where the alleged illegal conduct involved a conspiracy between an in-state distributor and an out-of-state supplier to fix the price of one piece of equipment shipped across state lines.

Petitioner[18] relies heavily on *Goldfarb* v. *Virginia*

[17] *See also John Kalin Funeral Home, Inc.* v. *Fultz*, 313 F. Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert. denied*, 404 U.S. 881 (1971). *See also* the cases cited *supra* in footnote 15, at p. 27 herein.

[18] The *amicus curiae* Federation of American Hospitals makes essentially the same argument as does petiitoner and similarly attempts to measure Sherman Act jurisdiction by looking to the effect on interstate commerce of all hospitals. (Federation Brief at 8-16.)

State Bar, 421 U.S. 773 (1975), for its argument that the provision of hospital services is an "integral" part of the interstate purchase of supplies and receipt of payment from out-of-state insurers, including Medicare and Medicaid. However, petitioner's reliance is misplaced. In *Goldfarb*, plaintiff petitioners, on behalf of themselves and a class of all others similarly situated in Fairfax County, Virginia, brought an action against various Virginia bar associations. Petitioners in *Goldfarb* alleged that ". . . the operation of the minimum fee schedule, as applied to fees for legal services relating to residential real estate transactions, constitutes price-fixing . . ." in violation of the Sherman Act (421 U.S. at 778). The product market allegedly restrained was "legal services relating to residential real estate transactions," which "transactions" included the financing of home purchases.

The Court in *Goldfarb* noted that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the state of Virginia. . . ." (421 U.S. at 783.) Indeed, the lower court found that over 55 percent of the total volume of all mortgages in Fairfax County were to mortgagees located outside of Virginia (355 F. Supp. at 497) and also that "a large percentage of persons who live in Fairfax County work outside of Virginia (355 F. Supp. at 494), and a substantial percentage of the residents had moved into the county within recent years from out of state. (355 F. Supp. at 497.)

In *Goldfarb*, this Court explained the needed relationship between a local activity and an interstate transaction, which made the local activity "integral" to the interstate transaction:

> Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-

> fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title on the borrower. *In financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined. . . .'* Thus, a title examination is an integral part of an interstate transaction. (421 U.S. 783-84, emphasis added; footnotes omitted.)

Accordingly, in *Goldfarb* the reason for the provision of legal services was the effectuation of the interstate housing financing transaction. The legal services in *Goldfarb* had no function or purpose separate and apart from the interstate housing financing transaction, ". . . which created the need for the particular legal services in question. . . ." (*Id.* at 783.) The legal services were consumed as an indistinguishable part of the interstate housing financing transaction.

Similarly, in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 343 U.S. 219 (1948), the Court determined that an alleged conspiracy by sugar refiners in northern California to fix the purchase price of sugar beets sold by local sugar beet growers was in commerce. The Court concluded that the sugar beet sales were part of one integral refinery process from which sugar was obtained for sale in interstate commerce. In *Mandeville*, the reason for sale of sugar beets was the effectuation of the interstate sale and distribution of sugar. As with the legal services in *Goldfarb*, the cultivation and sale of sugar beets in *Mandeville* had no function or purpose separate and apart from the interstate sale and distribution of sugar, "which created the need for the particular" local sugar beet commodity. The sugar beets were consumed as an indistinguishable part of the interstate sale and distribution of sugar.

In contrast, the provision of hospital services by Mary Elizabeth Hospital has a purpose and function separate

and apart from the receipt of Medicare or Medicaid and private health insurance payments and the use of out-of-state equipment and supplies. The reason for the provision of hospital services is the personal and localized need of the patient, not the effectuation of interstate health insurance or supply sales. In the instant case, the provision of hospital services are not consumed as an indistinguishable part of interstate supply sales or the provision of health insurance, as were the legal services in *Goldfarb* and the sugar beets in *Mandeville*. Mary Elizabeth Hospital may consume out-of-state supplies in the course of providing a local service, but virtually all local businesses, such as the provision of local taxi service,[19] utilize supplies that have travelled among the states. The fact that a local business makes use of goods or services that have travelled across state lines does not make every local business "integral" to the interstate commerce of such goods and services. Virtually all interstate commerce terminates in a local sale or the provision of a local service, but the local sale or service is "integral" to the interstate commerce of such goods and services only when the local service has no purpose or function separate and apart from the interstate sale or service. Accordingly, the provision of hospital services by petitioner is not transformed into or made an integral part of interstate transactions because it may use out-of-state supplies, equipment and insurance in rendering such services.

Petitioner also mistakenly relies on *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), claiming that Mary Elizabeth Hospital's contacts with interstate communications place it in interstate commerce

---

[19] *See United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233, where the Court held that daily taxi service of persons from their homes to railroad stations for interstate travel, was "not an integral part of interstate transportation," and did not transform that activity into an interstate activity.

just as the interstate contacts of the defendants-respondents in *South-Eastern Underwriters, supra.* (Br. at 43.) The facts in *South-Eastern Underwriters, supra*, are not at all similar to the facts in the instant case. In *South-Eastern Underwriters, supra*, the complaint alleged an underwriting association and its approximately 200 member companies, controlling ninety percent of the fire insurance sales in the relevant multi-state geographic market, conspired to fix premium rates and commissions across a six-state area and to use boycotts and other types of coercion and intimidation to force non-member companies to join the conspiracy and to compel persons to buy insurance only from the association and its members (322 U.S. at 534-35).[20] In deciding that the conspiracy alleged in *South-Eastern Underwriters, supra*, occurred in the flow of interstate insurance business, the Court noted that of the 200 allegedly conspiring companies only eighteen maintained home offices in the six-state geographical market, and that the business of negotiating insurance policies and policy premiums occurred between company headquarters and customers across state lines. In short, the Court found the daily activity in several states and the alleged conspiracy to restrain the insurance business across six states occurred in the flow of interstate commerce.

---

[20] Petitioner suggests that because the Court in *South-Eastern Underwriters, supra*, considered relevant the fact that the out-of-state headquarters of the defendant insurance companies made decisions that were implemented in several states where those companies sold insurance, the Court in the instant case should consider other "local markets such as the Raleigh area" (Br. at 43) in determining the jurisdictional questions herein. This suggestion disregards the significant and critical fact that the complaint allegations in *South-Eastern Underwriters, supra*, related to a multi-state geographic market controlled by companies outside those states. Wake County, North Carolina, is the sole geographic market alleged in the petitioner's complaint allegations.

III. THE CONDUCT COMPLAINED OF DID NOT SUBSTANTIALLY AND ADVERSELY AFFECT INTERSTATE COMMERCE.

A. The Effect, If Any, of the Alleged Conspiracy on Interstate Commerce Resulted Indirectly from the Alleged Prevented Expansion of Mary Elizabeth Hospital.

The second test for Sherman Act jurisdiction is whether the conduct complained of, "however local its immediate object . . . substantially and adversely affects interstate commerce." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974). The conduct complained of in petitioner's amended complaint does not "substantially and adversely" affect interstate commerce and therefore fails to satisfy the second jurisdictional standard under the Sherman Act.

Petitioner has alleged in its complaint, as amended, that in 1972: it purchased goods and equipment "pursuant to national contracts negotiated" by petitioner's parent "which . . . establish the terms of purchase" (App. at 35); it "regularly utilizes interstate communications, including the mails, telephone and telegraph, to carry on its business" (App. at 35); it pays its out-of-state parent a fee for management services (App. at 35); "a substantial number of persons regularly come from states other than North Carolina to the Raleigh area for treatment in medical-surgical hospitals there" (App. at 36); it receives payment for hospital services provided to patients from private insurance companies, including Blue Cross and Medicare and Medicaid (App. at 36); it will finance the cost of its expansion with out-of state-loans (App. at 37); it is the wholly-owned subsidiary of an out-of-state corporation (App. at 34), and it is accredited by a national hospital accreditation organization (App. at 37).

The complaint allegations make clear that the conduct complained of was a conspiracy to prevent petitioner from obtaining approval of its application to expand Mary Elizabeth Hospital in Raleigh, North Carolina, from a 49-bed facility to a 140-bed facility. (*See supra* at pp. 3-7). Petitioner concedes that its application for expansion was approved on June 30, 1972, only eight months after it was filed (App. at 18 and 21). It is also conceded that, if no opposition had been filed by respondents, petitioner would not have been able to obtain approval and begin construction until March 1, 1972. (App. at 26.) The alleged conspiracy, therefore, caused a delay of approximately four months in obtaining approval for expansion.

Petitioner also alleges that an appeal of its approval was taken pursuant to the alleged conspiracy to oppose its planned expansion. (App. at 23.) Such appeal did not stay the approval of petitioner's Certificate of Need, and petitioner could have, therefore, commenced construction on its planned expansion. Petitioner does not deny that no stay of the approval of its Certificate of Need was obtained. (Br. at 9, n.11.)

In response to questions from the district court below during oral argument, counsel for petitioner made clear that the gravamen of petitioner's complaint was the "thwarting" of petitioner's planned expansion of Mary Elizabeth Hospital:

> THE COURT: But what you complain of here is not the actual commerce with some out of state supplier or lender or patient or something but your ability to expand an existing business, triple it I believe you say, in order to provide more services, and it is that thwarting of your intention and your desire to expand your business that has been the subject of their alleged restraint, is it not?
>
> MR. TRAIN: That's correct. (App. at 43-44.)

In its Brief (App. at 26, 28 and 30-31), petitioner paraphrases conclusory assertions in its complaint that respondents conspired ". . . to fix, maintain and allocate the number of paid hospital beds . . . in the Raleigh area. . . ." (App. at 15.) All the allegations of fact in support of these conclusions involve the alleged conspiracy to prevent the expansion of Mary Elizabeth Hospital.

Even assuming the alleged conspiracy began in 1970, petitioner alleges nothing to indicate that respondents undertook any action other than the opposition to petitioner's application for a Certificate of Need and the appeal of the approval of that application in pursuance of the conspiracy.[21] Accordingly, even though the alleged conspiracy only resulted in a delay of four months in gaining approval of petitioner's Certificate of Need, respondents herein have addressed the complaint as if it alleged that respondents had prevented Mary Elizabeth Hospital's expansion from March 1, 1972, the date upon which petitioner admits it was prepared to commence construction, until the Certificate of Need Act was invalidated in February, 1973.[22]

It must be emphasized that the complaint does not allege and petitioner does not contend that the alleged conspiracy had as its object the elimination of Mary Elizabeth Hospital from Wake County, North Carolina. More significantly, it is not contended that, other than the delay in obtaining approval of its Certificate of Need, the alleged conspiracy interfered with the amount of goods purchased by petitioner, or interfered with or

---

[21] Petitioner also alleges that respondents created adverse publicity against petitioner's expansion by publicly stating respondent Rex and co-conspirator Wake could supply the additional hospital beds allegedly needed in the "Raleigh area." (App. at 24.) Petitioner does not state the manner in which such statements prevented it from commencing construction of its expansion.

[22] *See In the Matter of Certificate of Need for Aston Park Hospital*, 282 N.C. 542, 193 S.E.2d 729 (S.Ct. N.C., February 1973).

limited the number of Mary Elizabeth Hospital's patients whose hospital care was paid for by Medicare, Medicaid or private health insurance, or limited the number of out-of-state patients that Mary Elizabeth treated.

B. The Alleged Prevention of the Expansion of Mary Elizabeth Hospital Did Not Substantially and Adversely Affect Interstate Commerce.

The Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 202 (1974), explained the analysis to be undertaken in determining whether the conduct complained of, although local and intrastate, substantially and adversely affects interstate commerce:

> A court cannot presume that such [substantial] effects exist. The plaintiff must allege and prove that *apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. See U.S.* v. *Yellow Cab Co.*, 332 U.S. at 230-234.[23] (Emphasis added.)

Similarly, in *Rasmussen* v. *American Dairy Ass'n.*, 472 F.2d 517, 527 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), the court in determining whether a statewide conspiracy substantially and adversely affected the interstate commerce of a product, stated:

> The basic issue . . . is the extent to which a prohibition of the defendants' specific conduct is justifiable as a means of protecting the specific line of interstate commerce involved.

[23] *See also United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 278 (1975) ("the Sherman Act has been applied to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce"). This is not a *de minimus* test, as argued by petitioner (Br. at 32) but one of substantial effect. Indeed, the reach of Congressional power under the Commerce Clause is one of "substantial impact" on interstate commerce. *See United States* v. *Darby*, 312 U.S. 100, 119 (1941).

In addition to analyzing whether the complained of conduct adversely affected "interstate markets," the Court has also looked to the total dollar amount of goods or materials travelling interstate which were adversely affected by the alleged local conspiracy. For example, in *Burke* v. *Ford*, 389 U.S. 320-21 (1967), the Court found the interstate flow of liquor into Oklahoma was substantially and adversely affected by an alleged intrastate conspiracy of all the liquor wholesalers in Oklahoma to allocate territories for the sale of liquor, all of which liquor sold in the state was shipped into Oklahoma from outside the state. The court in *Burke* v. *Ford*, *supra*, noted that wholesale purchases of such out-of-state liquor amounted to between $44 million and $45 million in 1964. (389 U.S. at 321, n.1.)

Similarly, in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186 (1962), the Court found jurisdiction present where a labor union and a trade association of contractors, which contractors did 60% of the plastering contract business in Chicago, conspired "to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors" without union approval. (347 U.S. at 188.) In finding jurisdiction was present, the Court stated: "a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate" commerce. (347 U.S. at 189.)

In other situations where the activities involved in the alleged conspiracy or attempt to monopolize are local and intrastate, courts have considered the subject, or thrust or aim of the alleged conduct in determining whether the effect of such conduct in interstate commerce is substantial.[24] In *United States* v. *Yellow Cab*

[24] Relying on *Lehrman* v. *Gulf Oil Corp.*, 464 F.2d 26 (6th Cir.), *cert. denied*, 409 U.S. 1077 (1972), petitioner argues that the court below erred in considering the thrust or subject of the conduct

Co., 332 U.S. 218 (1947), the Court looked to the object or thrust of the alleged conspiracy (the commerce "toward which this aspect of the conspiracy was *directed*" (*Id.* at 230; emphasis added)) and determined that Sherman Act jurisdiction was not present. *See also Lorain Journal* v. *United States*, 342 U.S. 143, 150 (1951) ("the publisher's conduct was aimed at a larger target").[25]

The alleged conspiracy in the instant case had as its subject the provision of hospital services in Wake County and could not have substantially and adversely affected the interstate commerce in each product line which Mary Elizabeth Hospital received from out of state. More importantly, the alleged conspiracy was incapable of interfering with competition in those interstate transactions in supplies, insurance, communication and interstate travel. An analysis of each such interstate contact will demonstrate that the alleged conspiracy did not and could not substantially and adversely affect interstate commerce.

1. *The Use of Out-of-State Supplies and Equipment*

Petitioner argues that the alleged conspiracy to prevent Mary Elizabeth Hospital's expansion "impedes the

---

complained of as relevant to the determination of whether interstate commerce has been affected substantially and adversely. (Br. at 34.) In *Lehrman*, the thrust of the alleged conspiracy was irrelevant because, as the court there found and as the plaintiff there alleged, the claimed price fixing conspiracy was multi-state, covering the entire Southwest. (*Id.* at 32.)

[25] *Accord, United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) ("this Court has on occasion determined that local conduct could be insulated from the operation of the antitrust laws on the basis of the purely local aims of a combination . . ."); *Page* v. *Work*, 290 F.2d 323, 330 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); *Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W. Loc. #881*, 457 F.2d 1032, 1035 (9th Cir. 1972); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

natural flow of supplies and services" and "particularly the substantially increased flow of supplies and services" that would have been transmitted "to an expanded" Mary Elizabeth Hospital. (Br. at 30.) The complaint does not allege that the conspiracy interfered with the purchase of equipment and supplies,[26] nor is it claimed that the purpose of the alleged conspiracy was to be achieved by restricting the out-of-state supplies utilized by petitioner, or by fixing prices on such out-of-state supplies or services. Rather, it is alleged that the conspiracy prevented the approval of Mary Elizabeth Hospital's application for a ninety-one bed expansion. Accordingly, any effect on the flow of supplies in interstate commerce could have resulted only to the extent that each of the planned additional 91 beds would have been occupied, and occupied by patients requiring the types of supplies and materials that traveled in interstate commerce. (Br. at 26.)

Moreover, the duration of the effect, if any, on the flow of supplies to Mary Elizabeth Hospital, according to the complaint allegations, was for approximately four months and only for the supplies needed for the additional ninety-one beds. Further, the complaint, as amended, does not allege that Mary Elizabeth purchased these supplies from out of state. The complaint allegations assert only that the supplies "are purchased pursuant to national contracts negotiated by" petitioner's parent company.

More importantly, petitioner has not alleged that the claimed conspiracy will have any effect on the interstate market for such supplies and equipment in Raleigh, North Carolina, or elsewhere. Out-of-state suppliers are not allegedly involved in the claimed conspiracy, and are continuing to compete for sales in the Raleigh area.

---

[26] *See Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959).

The delay in the expansion of Mary Elizabeth Hospital will not lessen this competition because Mary Elizabeth Hospital purchases its supplies "pursuant to national contracts" "which [contracts] establish the terms of purchase" and are negotiated by petitioner's parent. (App. at 35.) Thus, as stated in *Rasmussen* v. *American Dairy Ass'n.*, 472 F.2d at 527, the "prohibition" of respondent's "specific conduct is [not] justifiable as a means of protecting the specific line of interstate commerce involved." *See also Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 202.

Overwhelming precedent squarely holds that an alleged conspiracy to restrain the operation of a local business, such as the instant alleged conspiracy to restrain the provision of hospital services, does not substantially and adversely affect interstate commerce in the out-of-state supplies purchased by that business.

In *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), *aff'g*, 95 F.Supp. 103 (D. Oregon 1950), the government alleged that a statewide organization of doctors had conspired to restrain and to monopolize the provision of prepaid medical care throughout the State of Oregon. (343 U.S. at 330.) The prepaid medical care plan included the provision of hospital care and the organizations regularly "purchas[ed] and procur[ed] medicines, drugs, medical supplies, and instruments shipped from other states . . . into the State of Oregon." (95 F.Supp. at 114.) The organization also engaged in the use of interstate transportation and communication facilities to carry on its business. The court affirmed the finding of the district court that such interstate contacts were insufficient for Sherman Act jurisdiction.

Similarly, in *Page* v. *Work*, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961), plaintiffs claimed the alleged conspiracy to monopolize the legal advertising market in Los Angeles County had a "direct and substantial effect" on the interstate commerce in newsprint and ink because plaintiffs' newspaper ceased buying newsprint and ink when it went out of business. The court rejected plaintiffs' argument stating that the defendants ". . . were in no position to nor did they restrict competition in the newsprint market" (*Id.* at 332) and there "was no evidence that appellees [defendants] did anything to interfere with newsprint purchases . . ." by plaintiff. (*Id.*) *Accord, Evans* v. *S. S. Kresge Co.*, 394 F.Supp. 817, 838 (W.D. Pa. 1975); *Marston* v. *Ann Arbor Property Managers (Management) Ass'n*, 302 F.Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).[27]

2. *The Receipt of Insurance Payments from Out-of-State Insurers and Medicare and Medicaid*

Petitioner also contends that the alleged conspiracy will substantially and adversely affect "the flow of payments for hospital services from out-of-state health insurers and the federal government under Medicare and Medicaid." (Br. at 30.)[28] The complaint does not claim that the alleged conspiracy herein involved any out-of-state insurer. Nor does the complaint allege that the conspiracy to prevent petitioner's expansion was accomplished by interference with out-of-state insurance, Medicare and Medicaid payments. Thus, the fact that

---

[27] *See also Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964).

[28] Relying on *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), petitioner and the *amicus curiae* Federation of American Hospitals argue that because some of the patients petitioner treat qualify for Medicare or Medicaid and have private health insurance, the provision of hospital services to those patients is "integral" to an interstate transaction, *i.e.*, the payment by those insurance companies. Respondents have addressed those arguments in another part of this Brief. *See supra* at pp. 29-34.

petitioner receives such payments is not relevant to the jurisdictional inquiry. The only claim is that the alleged out-of-state payments and communications would have increased if the alleged conspiracy had not delayed the approval of the Certificate of Need. (Br. at 26.)

In *United States* v. *Oregon State Medical Society*, *supra*, the Court held that the interstate contacts of a statewide prepaid health plan were insufficient to satisfy the jurisdictional standards of the Sherman Act. In that case, the statewide organization sent medical policies across state lines, and, as part of its "regular course of business, arrang[ed] to pay for . . . medical care rendered by doctors, hospitals and others in other states . . . ." (95 F. Supp. at 122.) These contacts were held insufficient for Sherman Act jurisdiction. 343 U.S. 326 (1952).

Medicare and Medicaid are wholly administered by in-state intermediaries and carriers. (*See* 42 U.S.C. §§ 1395h and 1395u.) In North Carolina, the state intermediary for Medicare is Blue Cross of North Carolina[29] and Mary Elizabeth Hospital deals with Blue Cross of North Carolina for reimbursement under Medicare for treatment provided to qualifying patients. North Carolina Blue Cross processes requests for payments and actually makes the payments for hospital services from funds which have been made available to it. (20 C.F.R. § 405. 1803(a) (1975) and 42 U.S.C. § 1395h(a)). Thus, the administration of and payments made under Medicare for hospital services rendered by Mary Elizabeth Hospital are all intrastate even though federal funding is involved. However, the funds are allocated on a regular

[29] Petitioner alleges that 56 per cent of its charges were made to private insurance programs, including Blue Cross. Petitioner does not advise the Court that virtually each state and major metropolitan area has an independently financed, regulated, operated and incorporated Blue Cross plan. Blue Cross is a state-wide insurance plan, regulated by the State of North Carolina. *See* G.S. North Carolina, §§ 57.1 *et seq.* (Michie Replacement 1957).

basis to the local intermediary by letter of credit, and the amount of such funds are based on an estimate, not for past services rendered. (31 C.F.R. §§ 205.1 *et seq.* (1975)).

The only distinction between the interstate contacts in the instant case and those in *Oregon State Medical*, *supra*, other than the fact that the interstate contacts herein are far less substantial than in *Oregon State Medical*, is the indirect contacts with federal funding. As amendments to the Social Security Act, the Medicare and Medicaid programs are established and funded under the General Welfare Clause of the Constitution. *See Helvering* v. *Davis*, 301 U.S. 619 (1937). Accordingly, petitioners are arguing that the scope of Sherman Act jurisdiction, a statute passed under the authority granted in the Commerce Clause of the Constitution, may be enlarged by virtue of funds received under legislation enacted under the General Welfare Clause. Yet, Congress explicitly provides in 42 U.S.C. § 1395 that such funding shall not be the basis for any federal regulation of hospital and medical services. Legislation passed under the General Welfare Clause, such as Social Security, reaches into every walk of life.[30] If jurisdiction under the Sherman Act may now be grounded on the movement of funds appropriated through legislation enacted under the General Welfare Clause, every employer who is involved in the Social Security program will be subject to Sherman Act jurisdiction. Thus, legislative authority limited by one Constitutional clause will be expanded by virtue of another. Certainly, this cyclical enlargement of federal power should not be permitted. *See N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), and *Maryland* v. *Wirtz*, 392 U.S. 183, 197 (1968).

[30] *See, e.g.*, Food Stamp Act of 1964, 7 U.S.C. §§ 2011 *et seq.* (1970); Social Security Act of 1935, 49 Stat. 620 (1935) codified throughout Title 42 U.S.C. (1970).

The conspiracy alleged in petitioner's complaint could have had no effect on competition in the private health insurance market in Raleigh, North Carolina, and nationwide. It is not alleged that out-of-state insurers were involved in the conspiracy.[31] Moreover, there is no competitive market for Medicare and Medicaid payments. Any patient who qualifies for those programs is entitled to payment, and patients may select any hospital in Raleigh, North Carolina, to provide them with service. (App. at 13.) Competition is for the treatment of patients, and this competition occurred in Raleigh, North Carolina.

3. *Communications Across State Lines*

Petitioner's argument concerning its receipt of payment from out-of-state insurance companies and Medicare and Medicaid[32] is very similar to its argument concerning its use of interstate communications including telephone, telegraph and the mails. (App. at 35.) Both arguments implicitly are based upon the supposition that interstate communications, whether payments or correspondence, would have increased absent the alleged conspiracy to delay Mary Elizabeth Hospital's expansion. In both arguments, petitioner relies upon the interstate communications engaged in by virtually every business.

---

[31] Petitioner misrelies on the complaint filed in *United States* v. *American Society of Anesthesiologists, Inc.*, Civil No. 75-4640 (S.D.N.Y. filed September 22, 1975), for the proposition that payments by insurance companies and Medicare and Medicaid constitute an independent jurisdictional basis under the Sherman Act. (Br. at 25, n.28.) The American Society of Anesthesiologists, Inc.'s, complaint alleges a nationwide price fixing conspiracy among the Society, all its members and component societies. (Br. at A-2.)

[32] Because Medicare is totally administered by a local Blue Cross corporation (*see supra* at p. 44), petitioner may have virtually no out-of-state communications with respect to the provision of hospital services to patients in this program.

In *Cotillion Club Inc.* v. *Detroit Real Estate Board*, 303 F.Supp. 850 (E.D. Mich. 1964), plaintiff made virtually the same assertions as petitioner does herein, alleging that defendants, real estate brokerage firms, conspired to restrain trade in the ". . . purchase, sale, transfer, [and] financing of real estate, including federally financed and insured real estate. . . ." (*Id.* at 852.)

The complaint in *Cotillion Club* alleged the receipt and transmission of "information and listings to and from other states," the filing of "applications, reports and other documents for transmittal to Washington, D.C., or other out-of-state offices of various Federal Housing Agencies," and the completion of "investigations, appraisals and surveys of federally financed or insured Michigan real estate to be transmitted to other states." (*Id.* at 853.) The court in *Cotillion Club* stated:

> [A]n attempt has been made to rely upon certain incidental activities across state lines [to invoke Sherman Act jurisdiction]. This is an effort to utilize incidental minor activities, consisting of the transmission of information across state lines, as a jurisdictional foundation for a substantive charge of alleged federal antitrust violations. The effort is strained and, in the Court's opinion, overreaching. The foundation is patently incapable of supporting such a structure. (*Id.* at 854.)

Accord, John Kalin Funeral Home, Inc. v. *Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd per curiam*, 442 F.2d 1342 (9th Cir.), *cert denied*, 404 U.S. 881 (1971).

The Court's observation in *Cotillion Club* is applicable in the instant case. Any business, regardless of size, engages in the use of interstate means of communication. The connection between the alleged conspiracy and the volume of correspondence and use of interstate com-

munications is a strained attempt by petitioner to list every conceivable contact it may have with out-of-state facilities, regardless of significance or relationship to the alleged conspiracy.

4. *Out-of-State Financing and the Planned Expansion of Mary Elizabeth Hospital*

Petitioner also claims the alleged conspiracy has a substantial and adverse effect on interstate commerce because petitioner intended to use out-of-state financing for the expansion of Mary Elizabeth Hospital. (App. at 37; Br. at 30.) It is not alleged that the purported conspiracy to prevent the expansion was effectuated by interfering with petitioner's financing.[33] The alleged financing of the expansion was a "one-shot" arrangement. In *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d (2d Cir. 1964), plaintiff, a wholly-owned subsidiary of an out-of-state corporation, alleged defendants had conspired in violation of Section 1 of the Sherman Act to terminate plans for the construction of a bowling alley, which would have been constructed with out-of-state materials. The court there held that the alleged conspiracy did not have a substantial and adverse effect on the interstate equipment which would have been utilized in the construction because the alleged financing was a "one-shot" occurrence.

5. *Travel of Out-of-State Patients and Other Alleged Out-of-State Contacts*

In its Brief (Br. at 26), petitioner also argues that Mary Elizabeth Hospital competes with respondent Rex

[33] In its Brief, petitioner states its financing "commitment expired of tis own terms." (Br. at 9.) This "fact" was not alleged in the amended complaint and was not presented to either the district court or the court of appeals and is not part of the record. Moreover, petitioner's statement does not indicate whether its financing expired before or after it obtained approval to expand on June 30, 1972

and alleged co-conspirator Wake to serve out-of-state patients "who come to the Raleigh area for treatment." Recognizing that courts have with virtual uniformity found that such allegation is insufficient for a finding that an alleged local conspiracy to restrain the provision of hospital services substantially and adversely affects interstate commerce, petitioner states it is not relying on this allegation for jurisdiction. (Br. at 26, n.32.)

Substantial precedent holds that an alleged conspiracy to restrain the provision of hospital services in a local area, such as Wake County, North Carolina, where some of the patients treated come from out of state, does not have a substantial and adverse effect on the interstate travel. *See Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States* v. *Oregon State Medical Society*, *supra; Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1189 (E.D. Mich. 1973); and *United States* v. *Yellow Cab Co., supra.* As stated in *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664, 669 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962):

> Neither the facts in this case, nor any other authority known, supports the theory here advanced, namely, that local activities are illegal under the Sherman Act because they concern persons who have previously moved in interstate commerce or who, after receiving a local personal service, may thereafter move in interstate commerce.

Petitioner's remaining complaint allegations are that it is a local subsidiary of an out-of-state corporation[34] which provides petitioner with management services for

[34] Petitioner alleges in its complaint that it is the wholly-owned subsidiary of a parent corporation that owns several hospitals in other states. (App. at 36.) The alleged conspiracy by two non-profit local hospitals in Raleigh, North Carolina, could have no practical effect on the ability of petitioner to compete in the provision of hospital services.

a fee, and petitioner has been accredited by a national accreditation agency. (App. at 34 and 37.) The conspiracy alleged in the complaint has had no substantial and adverse effect on these fixed relationships, or upon any of those interstate markets. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 202. *See also United States* v. *Yellow Cab Co.*, *supra;* and *United States* v. *Oregon State Medical Society, supra.*

6. *The Necessity for a Jurisdictional Line Under the Sherman Act*

As recognized by Judge Craven in the majority opinion below, there are no bright lines dividing cases in which the effect of the alleged anticompetitive conduct substantially and adversely affects interstate commerce from those cases in which it does not. "The complexities of modern business have little room for contracts, or business transactions, which cannot be said in some degree to affect interstate commerce." *Cotillion Club*, 303 F. Supp. at 854. Virtually every business utilizes supplies that flow in interstate commerce and engages in interstate communication with the federal government and with suppliers. The question in each Sherman Act case is where should the jurisdictional line be drawn. This line must be drawn, under the Sherman Act, on a case-by-case basis analyzing the facts alleged. Respondents submit that the instant case presents a situation that should fall outside the scope of the Sherman Act and into the sphere of state antitrust laws. The states all have mini-Sherman Acts and alleged restraints of trade can be successfully challenged under such statutes. (*See e.g.*, G.S. North Carolina, §§ 75-1 *et seq.* (Michie Replacement 1975)). However, if the all-persuasive influence of federal spending under the General Welfare Clause is to be the tail which wags the dog of the interstate commerce test, the federal system will experience another step toward its demise. As recognized by this

Court in *N.L.R.B.* v. *Jones & Laughlin, supra,* 301 U.S. at 37, in upholding the broad sweep of the National Labor Relations Act, in an opinion by Chief Justice Hughes:[35]

> Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Id. The question is necessarily one of degree.

IV. THE *EN BANC* DECISION CORRECTLY AFFIRMED DISMISSAL OF THE ACTION ON THE AMENDED COMPLAINT ALLEGATIONS.

Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure specifically contemplate dismissals on the complaint allegations where such allegations, if proved, will not support jurisdiction. The case authority is legion on the correctness of this dismissal on the complaint allegations for failure to state a claim or for lack of jurisdiction over the subject matter under the Sherman Act.[36]

---

[35] This warning was reiterated by the Court in *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968).

[36] *See, e.g., Wolf* v. *Jane Phillips Episcopal Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Riggall* v. *Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958); *Robinson* v. *Lull*, 145 F. Supp. 134 (N.D. Ill. 1956); *Marston* v. *Ann Arbor Property Managers (Management) Assn.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd per curiam*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970); *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964); *Hotel Phillips, Inc.* v. *Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962); *Evanston Cab Co.* v. *City of Chicago*, 325 F.2d 907 (7th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Yellow Cab Co. of Nevada* v. *Cab Emp. Auto. & W. Local #881*, 457 F.2d 1032 (9th Cir. 1972).

After having respondents' memorandum in support of its motion to dismiss for approximately four weeks, petitioner filed a detailed factual amendment to the jurisdiction allegations in its complaint. (App. at 34-38.) Respondents' memorandum had made petitioner fully aware of the jurisdictional defects in the complaint and petitioner set forth in its amended complaint all allegations of interstate commerce that it intended to prove for jurisdictional purposes. Respondents properly challenged these allegations as being legally insufficient, even if they could be proved. There was no need for discovery in order to decide the motion. *See* cases cited in footnote 36, page 51, *supra*. Furthermore, at the hearing before the district court petitioner made clear that the facts alleged in its amended complaint constituted the totality of the purported interstate commerce affected by the conduct complained of.[37]

The transcript of oral argument before the district court is barren of any suggestion by petitioner that it needed discovery. Indeed, petitioner indicated to the district court that it had "set forth in substantial detail the facts" which it believed satisfied the jurisdictional requirements and requested the court to move forward. Petitioner should not now be heard to argue it had insufficient opportunity for discovery.

---

[37] Petitioner stated to the district court:

> We have amended our complaint to set forth in substantial detail the facts which we intend to prove with respect to the involvement of interstate commerce because we felt that we'd like to move forward in this case and get to the merits of it and we would like the Court to have before it as soon as possible the facts that we felt justifies this Court in exercising its jurisdiction to deal with this particular situation, as we see it, this particular anti-competitive situation that we feel violates the Sherman Act.
>
> We have set forth the various facts which we believe satisfy both the tests Mr. Bolze has referred to. (Transcript before the District Court, Civil No. 4048, February 22, 1973, at p. 26.)

CONCLUSION

For all the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

RAY S. BOLZE
JOHN R. FORNACIARI
MARK W. PENNAK
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

THOMAS W. STEED, JR.
ALLEN, STEED & PULLEN
P.O. Box 2058
Raleigh, North Carolina 27602

JOHN H. ANDERSON
SMITH, ANDERSON, BLOUNT & MITCHELL
P.O. Box 750
Raleigh, North Carolina 27602

LILLARD MOUNT
HOFFLER, MOUNT, WHITE & LONG
102 East Main Street
Durham, North Carolina 27701

Attorneys for Respondents

December 22, 1975